LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUN 4 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, ~~1948~~ 49

No. ~~711~~ 49

HELEN PARKER, *et al.*,

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

No. ~~712~~ 50

JULIA LEARNED STEINER,

Petitioner,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

Petitioners' Special Reply Memorandum in Answer to Procedural Law Sections of Brief of Respondents.

LEE PRESSMAN,
9 East 40th Street, New York 16, New York,
Counsel for Petitioners Parker, et al.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street, Los Angeles 12, California,
Counsel for Petitioner Steiner.

JOHN T. McTERNAN,
WILLIAM B. MURRISH,
112 West Ninth Street,
Los Angeles 15, California,
Of Counsel in Parker, et al.

SUBJECT INDEX

PAGE

I.

Introduction 1

II.

The portion of the decision below which is in issue here on certiorari, namely, whether the county might constitutionally compel county employees to execute the oath and affidavit attached to the complaint, rests on no independent state ground but upon a flat holding that such a requirement is constitutional 2

III.

The petition for certiorari presents a case or controversy cognizable in the United States Supreme Court 7

IV.

Conclusion 14

TABLE OF AUTHORITIES CITED

CASES.

	PAGE
Aetna Life Ins. Co. v. Haworth, 300 U. S. 227	9
Alabama State Federation of Labor v. McAdory, 325 U. S. 450	10, 11
Grosjean v. American Press Co., 297 U. S. 233	6
Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U. S. 270	9
Perkins v. Elg, 99 F. 2d 408, aff'd 307 U. S. 325	6, 10
Terrace v. Thompson, 263 U. S. 197	6
United Public Workers v. Mitchell, 330 U. S. 75	10, 12, 13
Young, Ex parte, 209 U. S. 123	6

STATUTES

Rules of the United States Supreme Court, Rule 38	1
United States Constitution, First Amendments	3, 8
United States Constitution, Fourteenth Amendments	3, 8

TEXTBOOKS

Borchard, Declaratory Judgments, pp. 39, 41-43, 50-53	8

IN THE

Supreme Court of the United States

October Term, 1948.

No. 711

HELEN PARKER, *et al.*,

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

No. 712

JULIA LEARNED STEINER,

Petitioner,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

Petitioners' Special Reply Memorandum in Answer to Procedural Law Sections of Brief of Respondents.

I.

Introduction.

Although aware that Rule 38 of this Court does not in ordinary circumstances contemplate any rebuttal by a petitioner in certiorari matters, petitioners in the instant case conceive the unusual nature of the brief filed by respondents makes it appropriate if not mandatory that brief reply be made thereto.

Respondents have brushed aside all of the substantive issues of constitutional law raised by the petition and have devoted virtually the entirety of their brief to arguments urging this Court to deny hearing on procedural grounds alone. The supposed objections of procedural law raised by respondents are wholly misconceived and petitioners hasten to so demonstrate lest this Court be misled into denying consideration of the merits of the petition. In actuality consideration on the merits in the instant case is not only appropriate and proper in all respects but is in fact required by the deep obligations which attend this Court in its position as the nation's highest tribunal for the determination of questions of Federal Constitutional law. The substantive issues raised by the petition reach to the roots of free government in our nation and their full consideration and adjudication by this Court on the merits is a matter required by imperative public interest.

II.

The Portion of the Decision Below Which Is in Issue Here on Certiorari, Namely, Whether the County Might Constitutionally Compel County Employees to Execute the Oath and Affidavit Attached to the Complaint, Rests on No Independent State Ground but Upon a Flat Holding That Such a Requirement Is Constitutional.

Respondents aver that the Court below rested its decision not on grounds of constitutional law but on the failure of petitioners to exhaust administrative remedies before resorting to the courts, or upon the ground that the claimed threat of discharge was too speculative and premature to sustain an action. As to that portion of the decision below which alone petitioners have brought here on certiorari, the objections urged have no application. The portion concerned is that addressed to the question of the

right of the County to exact from County employees the compulsory disclosures respecting thought, speech and association contained in the oath and affidavit attached to the complaint. Petitioners contended below, as they contend here, that the exaction of such disclosures respecting thought, speech and association would be *per se* an invasion of petitioners' rights under the First and Fourteenth Amendments to the Federal Constitution, and that by virtue of that Constitution petitioners had an absolute right to refuse to execute the oath and affidavit as demanded. As to this issue[1] the court below found no procedural objection. It proceeded to a square consideration of that issue on the merits and ruled thereon adversely to petitioners' contentions. Witness these acts by the court below:

1. It posed the issue cleanly and precisely at the very outset of its opinion, setting forth the oath and affidavit at length and declaring the question to be the right of the

---

[1]It is true enough that as to certain other questions raised by other portions of petitioners' complaint the court below did raise the procedural objections noted in respondents' brief and did rule that as to those questions the action was improvident and premature. In particular, the Court so ruled as to petitioners' charges that the respondents had instituted the overall program of investigation described in the complaint, of which the oath and affidavit was but a component part, for the avowed purpose of uncovering the thoughts, speech and associations of all county employees with the intent to sit in judgment thereon and to inflict discharge or other penalty on all employees whose views or associations might be found "subversive"—in the uncontrolled discretion of the respondents. As to this portion of the complaint, the court below did declare that the question of possible discharge was premature and that petitioners' appropriate remedy was by way of administrative review after actual discharge, if any, should take place. But that matter is no longer of significance in petitioners' case. Petitioners seek no review of the decision below on that score.

County to require County employees to execute same [P. 48-49][2].

2. It then announced in a topic sentence of explicit and unmistakable terms the purport of its holding on the issue so posed. It stated:

> "This question must be answered in the affirmative. The mere asking of the question points unerringly to the answer any *loyal, sane,* citizen of the United States of America would give to it. It is an unequivocal 'Yes'." [P. 49.]

3. It then developed this thesis by relating at length the reasons and analogies persuading it that the requirement was constitutional. It found the oath and affidavit sustainable, first, on analogy to the power of the nation to compel service in the armed forces, reasoning that if citizens may thus be compelled to risk even life and limb, then, "any state in attempting to perpetuate its loyalty to the union has the unquestioned right and duty to exact from its citizens adherence to all lesser measures which have for their purposes the preservation of our form of government and the repression of its enemies" [P. 51]. It found the oath and affidavit sustainable also on analogy to the oath required of aliens seeking admission to citizenship [P. 57]. It further found the oath and affidavit permissible on analogy to the oaths required of applicants seeking membership in the Elks [P. 56-57]. Finally, it found the oath and affidavit sustainable on the basis of the employer-employee relationship. It said on this score:

> ". . . when a person enters the employ of this state or any subdivision thereof, he impliedly sur-

---

[2]The references throughout this memorandum are to the Parker Record only and are indicated thusly: "[P. 1]," meaning "Parker Record, page 1."

renders certain natural rights which would remain his if he were a private citizen only just the same as he would surrender certain privileges if he were to enter private employment." [P. 51-52.]

4. It concluded on the force of the above analogies that execution of the oath and affidavit might lawfully and constitutionally be required of all County employees as a condition of continued employment. In words which cannot be misread, it declared:

". . . If they cannot subscribe to the prescribed affidavit, they may join those who serve themselves in the ranks of private employment." [P. 56.]

Respondents would obfuscate and obscure the above plain holding by the court below on the question in issue here on certiorari by quoting from later portions of the court's decision which are not in point in subject matter. Respondents quote in this manner the following statements by the court below:

"'From what has so far been said, it is self-evident that neither the Board nor its agents can discharge a civil service employee for any cause that the Civil Service Commission finds insufficient. Accordingly, if in the view of the Board of Supervisors, or its agents as the appointing power, a civil service employee should be discharged on the sole ground that the employee is "subversive", the discharge or attempt to discharge on that ground is of no effect if, on hearing, the Commission holds otherwise.'" [P. 59.]

> "'. . . Whether the appointing power will or will not discharge employees as claimed by the plaintiffs, for causes of the character enumerated, and whether the Civil Service Commission will uphold such discharges, if any, on such causes, are not matters upon which this Court may speculate of adjudicate at this time. . . .'" [P. 63.]

On their face and particularly when read in context, these observations plainly relate to the separable claim by petitioners that the respondents had threatened to discharge employees whose views displeased them as "subversive"[3] and *not* to the portion of petitioners' complaint challenging *per se* the right of the County to require execution of the oath and affidavit on pain of discharge for refusal to sign.[4]

---

[3]See discussion in footnote 1, *supra*.

[4]Especially is this obvious with respect to the language of the court below which adverts to the concept of exhaustion of administrative remedies. Plainly the allusions to that doctrine could not have been intended to have any reference to the portion of petitioners' action contesting the constitutionality of the oath and affidavit as a condition of continued employment. There no administrative remedy exists. When respondents contend otherwise the only meaning their arguments can have is that petitioners should be required to first suffer unemployment before they might obtain standing to question the state's test oath. To say that petitioners must forfeit their means of livelihood and endure unemployment throughout lengthy litigation and review as the price for requesting adjudication of claimed constitutional rights would be to pervert and distort the doctrine of administrative remedies beyond recognition. *Cf. Ex parte Young*, 209 U. S. 123; *Terrace v. Thompson*, 263 U. S. 197, 214; *Grosjean v. American Press Co.*, 297 U. S. 233; *Perkins v. Elg*, 99 F. 2d 408, 413-414 (affd., 307 U. S. 325).

III.

The Petition for Certiorari Presents a Case or Controversy Cognizable in the United States Supreme Court.

The County Loyalty Order provides that it will "*require* all officers and employees coming under the jurisdiction of the Board of Supervisors . . . to execute an affidavit . . ." [P. 17.] As defined in Webster's International Dictionary (2d Ed., 1934) "require" means "to demand," "to exact," "to impose a command or compulsion." The Loyalty Order therefore places an immediate, unqualified duty upon petitioners and their class to execute the affidavit as part of the duties of their employment. This is demanded of them by their superiors in precisely the same manner as attendance upon the job and performance of the duties and functions of the position. The requirement of a position is a requirement of continued employment.

The complaint alleges that the County officers "have threatened and do now threaten, and will, . . . cause plaintiffs . . . to be discharged or otherwise penalized in their employment unless they execute the oath and affidavit prescribed and required by . . . said Loyalty Check" [Par. VII, P. 5]. That which the Loyalty Order on its face requires as a condition of employment the County officers have threatened to enforce by discharge or other penalty. The order itself and the threatened enforcement of it not only place petitioners under a present duty to comply but also subject them to imminent peril of legal injury. Petitioners and respondents therefore had interests which were "legal" or "protected," were actually "adverse," and the conflicting claims of rights had reached the stage of antagonistic assertion which "ripened" them

into "actual controversy" (see Borchard, *Declaratory Judgments*, pp. 39, 41-3, 50-3).

Petitioners' action in the California courts was to enjoin the imposition of such a requirement and to obtain a declaration that the County officers may not make or enforce such a requirement for the reason that such would deprive petitioners of their rights under the First and Fourteenth Amendments to the Constitution of the United States [see complaint, par. XII, P. 8; par. II (1), (6), (7), (12) and (13), P. 12-14; pars 1(a) and (b) and 2 of Prayer, P. 14-16]. The requirement, as alleged, is one which deprives petitioners of substantial personal rights, and in fact it was of a nature and quality to do so as our petition here set forth at length.

It is significant that the County does not meet petitioners in this central issue of the case. Respondents rather confine themselves to the observation that no one was alleged to have been discharged and therefore the complaint raised no case or controversy. The controversy here is whether plaintiffs may be forced to give up the most precious rights of a free people. Petitioners claim that the Federal Constitution deprives the County of right and power to "require" disclosure of political opinion and affiliation; adversely the County has asserted and proceeded to enforce the right and power to "require" such a disclosure. In this conflict of rights and powers the stakes are petitioners' jobs.

The facts alleged constitute a justiciable controversy under the tests laid down by this Court. The controversy is "definite and concrete, touching the legal relations of the parties having adverse legal interests." It is "real and substantial . . . : admitting of specific relief through a decree of a conclusive character as distinguished from

an opinion advising what the law would be upon a hypothetical state of facts." (*Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240-1.) Petitioners are not asking the Court to advise them on a hypothetical state of facts. They are immediately faced with the necessity of giving up personal rights of great importance or losing their jobs. In the language of the *Haworth* case this is not a "difference or dispute of a hypothetical or abstract character" (300 U. S. at p. 240) but rather one which directly affects the relationship of petitioners and respondents as employees and employers. As to petitioners their constitutional rights and their jobs are no more academic than the County's right to control and discipline its employees. The two groups of rights stand opposed at a point where one or the other must give way—now.

As this Court has recognized, the "difference between an abstract question and a 'controversy' . . . is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy" (*Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273). In the *Haworth* case, *supra*, the controversy held justiciable involved the duty of an insurer (plaintiff) to pay disability benefits to an insured who had filed a disability claim but who had failed to bring suit. In the *Maryland Casualty* case, *supra*, the controversy held justiciable was whether an insurer was obliged to indemnify an insured, or submit to supplemental proceedings brought by his judgment creditor, for a claim on which the insured's adversary had filed suit but not yet obtained judgment. If such controversies are "real" and "concrete," touching upon legal relationships, then here too such a controversy is presented, where petitioners and respond-

ents bear the relationship of employees and employer and the latter asserts the power to wring from the former disclosures in violation of the Constitution under pain of immediate discharge. Apposite is *Perkins v. Elg*, 99 F. 2d 408, 413-4 (affd. 307 U. S. 325, 350), where the plaintiff, claiming citizenship in the face of the government's notification that she was considered an alien and order to leave the country, sought a declaration of her status and an injunction against deportation. The Court in that case stated at page 414:

> ". . . she is entitled to a declaration of her political status for her rights as a citizen are valuable rights—certainly no less valuable than property rights,—and an actual and vital controversy exists between her and the government in relation to them. The right to be immune from threats of deportation and from the declarations of public officials that she is an alien and subject to arrest is, we think, a right . . . entitling Miss Elg to prosecute this suit."

So here petitioners have valuable personal rights to political freedom—to be fullfledged, not second-class, citizens—in addition to their jobs which are now in jeopardy by the requirements of the Loyalty Order and the County's threatened discharge action. The jeopardy is real and immediate. Plaintiffs have a right to a declaration.

The decisions of this Court in *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, and *United Public Workers v. Mitchell*, 330 U. S. 75, are not contrary to petitioners' position here. In the *McAdory* case this Court was called upon to declare the rights of certain labor organizations and the members thereof under a "comprehensive" state statute regulating unions and lay-

ing down certain conditions upon their "functioning" in the state. The petitioners there asserted that the statute in effect required a license as a condition to the exercise by unions and their members of the freedoms of speech and assembly. This Court observed there that while the "functioning" of labor organizations which was restrained and regulated by the statute might well be construed to include exercises of freedom of speech or assembly it was also possible it might be limited exclusively to such "business activities" as the petitioners there conceded and this Court assumed the state might properly regulate. Since neither the facts in the record nor the prior construction of the statute by the Alabama court had shown an actual or threatened application of the statute to labor union "functioning" other than such as involved "business activities" alone, this Court concluded no question of restraint upon speech and assembly was actually presented. It was therefore held that the Court had no issue to decide and could frame no decree defining the parties' rights.

> ". . . We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure."
>
> *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 460-61.

The *Mitchell* case, *supra*, presented a similar problem. In the face of a general statutory prohibition against taking "any active part in political management or political campaigns" appellants there asserted a desire to engage in "activities on behalf of those candidates for public office who I believe will best serve the interests of this country" through certain methods generally described.[5] No actual or threatened interference with appellants' desires or activities was alleged or proven. The issues tendered were the appellants' generalized desires against the naked, unimplemented statutory prohibition. The Court was not presented with a specification of either the desired activities of appellants or the actual or threatened interferences therewith. It could determine neither whether constitutional rights had been, or were about to be, abridged nor how to frame an effective judgment.

Central to the Court's position in both cases is that the judicial function cannot be performed except with reference to precise issues. It could not determine whether Alabama's regulatory scheme for labor unions so interfered with the "functioning" of a labor union as to abridge free speech and assembly without knowing pre-

---

[5]Significantly the methods described in appellants' affidavits (330 U. S. at p. 87, note 18) did not indicate whether they were or would be those which might be termed "partisan political activities" of the kind the Court held permissibly prohibitable in the case of Poole (330 U. S. pp. 100 *et seq.*).

cisely what particular regulation was in issue, how it had been, or was threatened to be, applied, and upon what "function" of the union it had been or was about to be brought to bear. In the *Mitchell* case the statute's broad prohibition was not juxtaposed with concrete activity nor with a specification of planned activity which the agency enforcing the statute had threatened to punish. The things the appellants said they wanted to do may or may not have been the kind of "partisan political activity" which the Court held the statute covered in *Poole's* case.

Neither of these decisions was predicated upon situations apposite to the case at bar. Here we have a command narrowly drawn and applicable to all alike. The County's Loyalty Order requires of each employee the same, single act of signing an affidavit and this requirement is operative to each individual irrespective of his particular situation. The consequences of non-compliance are the same for all. The required disclosure is an infringement of freedom of opinion and affiliation for all or for none and for the same reasons. There can be no situation in which the Loyalty Order in the respects here under attack operates differently for some or has varying consequences some of which might be permissible while others not. The threat of enforcement *for all* has been in effect, "Sign or else—." The Order and the threatened enforcement are either an infringement of constitutional guarantees or they are not. The judicial function can be exercised fully and completely by a determination that the

required disclosure can be enforced or can not. Hence there is in every sense a justiciable case and controversy.*

IV.

Conclusion.

Wherefore, the petition should be considered and adjudicated upon the merits.

Respectfully submitted,

LEE PRESSMAN,
Counsel for Petitioners Parker, et al.

JOHN T. McTERNAN,
WILLIAM B. MURRISH,
Of Counsel in Parker, et al.

A. L. WIRIN,
FRED OKRAND,
Counsel for Petitioner Steiner.

---

*One particular observation apropos the *Steiner* case, No. 712, is in order. With reference to that case, respondents have gone outside the record before this Court to make a claim that petitioner Steiner is no longer a County employee. They make reference to an Exhibit "A" which refers to a purported resignation. However, the resignation itself is not set forth nor is it shown that, if made, it was accepted.

Respondents have filed no Suggestion of Abatement or Mootness supported by proper affidavit. Accordingly this Court cannot speculate as to matters outside the record.

But in any event, the suit is a representative suit and those on whose behalf it is brought are equally parties before this Court and entitled to an adjudication of their rights. This is the rule both under California law (*Spellacy v. Superior Court*, 23 Cal. App. 2d 142; *Whitten v. Dabney*, 171 Cal. 621), and under the law of this Court. (*Cf. Walling v. James V. Reuter, Inc.*, 322 U. S. 674.)